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Filed

APR 07 2008

RICHARD W. WIEKING  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE

8 UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN JOSE DIVISION

11 In re: ) Class Action  
 12 )  
 13 PALM TREO 600 and 650 ) No. 05-03774 RMW  
 14 LITIGATION )  
 15 ) OBJECTION AND NOTICE OF  
 16 ) INTENTION TO APPEAR AT HEARING  
 17 ) ON PROPOSED SETTLEMENT AND AWARD  
 18 ) OF ATTORNEYS' FEES AND EXPENSES  
 19 )

Date: May 23, 2008

Time: 9:30 a.m.

Dept: 6, Hon. R. M. Whyte

20 TO: THE CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL  
 21 PLAINTIFFS AND DEFENDANTS AND THEIR RESPECTIVE  
 22 ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that pursuant to the notice issued by  
 24 this Court, dated January 28, 2008, David Brennan, who is a  
 25 member of the above-denominated Plaintiff Class (see Exhibit  
 26 A), files the following written objection to the proposed  
 27 settlement and attorneys' fee and expenses request. This Class  
 28 Member intends to appear through counsel and orally object at  
 the above-scheduled fairness hearing. With the Court's  
 permission, he anticipates that his oral presentation will not  
 exceed 30 minutes.

OBJECTION

Plaintiff Class Member/Objector objects as follows:

1. Lack of Proper Notice.

Class Member objects to the fee request of Class Counsel on the ground that a Rule 23 motion for attorneys' fees has not been made available to class members in a reasonable manner prior to their being required to file an objection to Class Counsel's fee request.

(1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.

Fed.R.Civ.P. 23(h)(1) and (2) (emphasis added).

Class Member therefore requests that the Court appoint a special master on behalf of the class to evaluate the reasonableness of Class Counsel's fee and expense request.

(See also Objection No. 6, *infra*, further justifying the appointment of a special master.)

The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed.R.Civ.P. Rule 23(h)(4).

Class Member also requests that the Court reschedule the date of the hearing on objections to Class Counsel's attorneys' fee and expense request. Said continued hearing, to be held at

1 a reasonable time after Class Counsel have filed their fee and  
2 expense application, and after Objector has had an opportunity  
3 to file a comprehensive objection to Class Counsel's fee and  
4 expense application.

5 In setting the date objections are due, the  
6 court should provide sufficient time after the  
7 full fee motion is on file to enable potential  
8 objectors to examine the motion.

9 Report of the Judicial Conference of the United States on Class  
10 Action Settlements (Feb. 2006), Proposed Amendments to Fed. R.  
11 Civ. Proc. 23, "Class Actions," Committee Note, Subdivision  
12 (h), ¶ 2; emphasis added.

13 Class members' due process right to be heard at the  
14 fairness hearing is violated under the terms of the notice and  
15 the Settlement Agreement, as class members are being obligated  
16 to file their objections to Class Counsel's fee request before  
17 Class Counsel's fee application is filed with the Court.

18 2. Insufficient Evidence Supporting Fee Request.

19 Class Member objects to Class Counsel's fee request  
20 of up to \$1,554,000. Class Member requests that the Court  
21 order Class Counsel to file their time records before any fee  
22 is awarded in this litigation.

23 3. Final Fee Award Premature.

24 The final fee award should be linked to the actual  
25 class member receipt of settlement benefits. Class Member  
26 objects to any final award of attorneys' fees until the number  
27 of class members who actually utilize settlement benefits is  
28 known and considered by the Court in calculating a final  
attorneys' fee award.

The relevant inquiry ... focuses a court's  
attention on the benefits actually received and

1           used by plaintiffs, [and] will determine not  
2           only the often evident threshold question of  
3           eligibility for fees, but it will also be  
4           critical in determining the amount of a  
5           reasonable fee award, in that the final award  
6           must depend on a full assessment of the extend  
7           of the benefits received by plaintiffs.  
8           (In re Prudential Ins. co. America Sales  
9           Practice Litig., 148 F.3d 283 n.116 (3d Cir.  
10          1998), cert. denied, 525 U.S. 1114 (1999);  
11          emphasis added.)

12          Class Member requests that no final determination of an amount  
13          of attorneys' fees be made until it is determined:

14               (a) the number of class members who submit  
15          valid and timely claims for cash rebates;

16               (b) the total dollar amount of money rebated to  
17          class members.

18               (c) the number of class members who submit  
19          valid and timely repair claims;

20               (d) the number of class members whose phones  
21          are repaired pursuant to the Settlement Agreement;

22               (e) the total number of class members in a  
23          class defined as:

24                       all United States residents who purchased  
25                       in the United States a new Treo 600 or Treo  
26                       650 smartphone for their own use and not  
27                       for resale.

28          Numerous courts, both state and federal, academic  
commentators, and the United States Congress have endorsed this  
approach in awarding reasonable attorneys' fees in class  
actions. See attached Addendum A.

It should be noted that this issue was the concern of  
proposed changes to Rule 23 of the Federal Rules of Civil

1 Procedure, entitled "Attorneys Fees: New Rule 23(h)," in which  
2 the comment reads:

3 One fundamental focus is the result actually  
4 achieved for class members, a basic  
5 consideration in any case in which fees are  
6 sought on the basis of a benefit achieved for  
7 class members. See RAND, *Class Action Dilemmas*,  
8 supra, at 34-35. The Private Securities  
9 Litigation Reform Act of 1995 explicitly makes  
10 this factor a cap for a fee award in actions to  
11 which it applies. See 15 U.S.C. §§ 77z-1(a)(6);  
12 78u-4(a)(6) (fee award should not exceed a  
13 "reasonable percentage of the amount of any  
14 damages and prejudgment interest actually paid  
15 to the class").... "Coupon" settlements may  
16 call for careful scrutiny to verify the actual  
17 value to class members of the resulting coupons.  
18 (Emphasis added.)

19 For example, The Honorable Ronald M. Sabraw of the  
20 Alameda County Superior Court ordered a reporting requirement  
21 in the *Prestemon v. Echostar Communications Corp., et al.*, No.  
22 2002-053014 (Super. Ct., Alameda Cty., Cal.), class action.  
23 Judge Sabraw, in his Order dated September 3, 2004, and ruled:

24 The Court hereby approves attorney fees and  
25 costs in the sum of \$458,000.00, payable  
26 forthwith by Defendants to Plaintiff's counsel,  
27 and reserves jurisdiction to award additional  
28 fees up to \$200,000 following the accounting to  
be rendered by Defendants as provided in this  
Order.

This matter is continued for a further  
hearing on the accounting to be rendered herein  
to May 13, 2005 at 9:00 a.m. in Department 22 of  
the Alameda County Superior Court. The  
accounting ordered herein shall be filed with  
the Court and served on all counsel, including  
Objectors counsel, Mr. Schonbrun, by May 6,  
2005.

*Id.*, Order 9/3/04, Nos. 2 and 3 (emphasis added).

1           4.   Parties Required to File Class Member Participation  
2           Data.

3           Without regard to objection No. 3, Class Member  
4 requests that the filing of the aforementioned information be a  
5 condition of court approval. This data is necessary to protect  
6 the interests of the class and ensure the proper functioning of  
7 the class action mechanism. The late John Frank, the assistant  
8 reporter to Benjamin Kaplan, who was the drafter of Rule 23, at  
9 public hearings with regard to Rule 23 reform, noted "a  
10 tremendous absence of empiric data" regarding class action  
11 settlements.

12           The findings of the RAND Institute for Civil Justice  
13 in *Class Action Dilemmas, Executive Summary* 24 (1999), reflect  
14 the importance of providing data on class member settlement  
15 participation:

16                     [J]udges should require ... reports on the  
17 process of claims administration - including the  
18 number of claims accepted and denied, reasons  
19 for denial.... These regular reports on claims  
administration should be available to the public  
for review. (*Id.* at 490.)

20           This need for data was echoed by the Honorable Paul  
21 V. Niemeyer,<sup>1</sup> at hearings with regard to Rule 23 reform:

22                     What is stunning about the way we proceed in  
23 rule revision ... is that we do it with a  
24 tremendous absence of empiric data.

25  
26  
27           <sup>1</sup> Paul V. Niemeyer, Chair of the Advisory Committee on Civil  
28 Rules of Practice and Procedure to the Judicial Conference of  
the United States and Judge on the Fourth Circuit Court of  
Appeals.

1           The Federal Trade Commission supports the inclusion  
2 of this type of information as part of the settlement approval  
3 process:

4                       Finally, in the event the Court approves ... any  
5 settlement with a coupon component, we urge the  
6 Court to require that counsel for the parties  
7 submit detailed information about the number and  
8 percentage of coupons redeemed, the rate of  
9 redemption, and the number of coupons  
10 transferred during the life of the coupons.  
11 This data, which is of great interest to courts,  
12 legislators, various governmental enforcement  
agencies, legal scholars, and the community at  
large, will assist all in assessing the efficacy  
of nonpecuniary coupon settlements. Tracking  
actual redemption experience, of course, would  
be critical to implementing this approach to fee  
approval as well.

13 *Haese v. H&R Block, Inc., et al.*, No. CV-96-423 (Dist. Ct.,  
14 Kleberg Cty., Tex., 105th Jud. Dist.) (Federal Trade  
Commission's Mem. P&A's as Amicus Curiae re the Proposed Class  
15 Action Coupon Settlement and Pet. for an Award of Attorneys'  
Fees, dated 6/4/03, at 31) (emphasis added).

16                       This request has been successfully raised and  
17 adopted in several recent class action settlements in  
18 California state courts.

19                       (a) The Honorable Ronald M. Sabraw of the  
20 Alameda County Superior Court ordered a reporting requirement  
21 in the *Prestemon v. Echostar Communications Corp., et al.*, No.  
22 2002-053014 (Super. Ct., Alameda Cty., Cal.), class action.  
23 Judge Sabraw, in his Order dated September 3, 2004:

24                       The Court having read and considered the  
25 pleadings and having heard the arguments of  
26 all counsel HEREBY ORDERS AS FOLLOWS:  
27 1. Objectors request for an accounting of  
benefits conferred upon the class is  
28 GRANTED. The Echostar Defendants are  
hereby ordered to render to the Court and  
(sic) accounting of all benefits conferred



1 upon the class pursuant to the terms of the  
2 settlement approved by the Court.  
3 Specifically, Echostar must provide an  
4 accounting as follows:

5 a. The number of Claim Forms  
6 submitted by class members;

7 b. The number and the type of PPV  
8 Certificates redeemed by class members, for  
9 both Current Customers and Former  
10 Customers;

11 c. The total number of Echostar  
12 customer accounts that received a credit,  
13 whether against Subscription Fees or other  
14 charges, in whatever amount toward their  
15 accounts and the total amount of all such  
16 credits applied by Echostar on behalf of  
17 the class as a whole;

18 d. The number of Equipment  
19 Certificates issued and redeemed.  
20 (Echostar need only account for redemption  
21 of Equipment Certificates if they are  
22 returned by the retailer to Echostar  
23 following purchase of equipment.)

24 (b) The Honorable Carolyn B. Kuhl of the Los  
25 Angeles County Superior Court ordered such a reporting request  
26 in the *Hotel Energy Surcharge Cases*, JCCP No. 4185 (Super. Ct.,  
27 Los Angeles Cty., Cal.):

28 Mr. Schonbrun: I would like to make two  
points, if could. The first has to do  
with my request that the Court require  
the parties as a part of approving  
these settlements that the number of  
class members who actually take  
advantage of these coupons be filed  
with the Court.

....

The reason I make this request is a  
public policy reason, and it's  
because, as I stated in my papers,  
specific data on who actually takes  
advantage of these coupons is missing  
from the equation in the debate about  
class actions.

(Hr'g Tr. at 2:28-3:1-11.)



1                   The Court:       With regard to the number of  
2                   coupons used.... It ... tells us what  
3                   cash value the class members made of  
4                   the case, and that could be compared  
5                   to, for example, ... the fees paid in  
6                   the case. And I think it is a useful  
7                   exercise.  
8                   (Hr'g Tr. at 33:20-28; 34:1-2;  
9                   emphasis added.)

10                   Coordination Proceeding Special Title (Rule 1550 (b)), No. JCCP  
11                   4185, Hr'g Tr. 10/20/02.

12                   [Defendant] is hereby ordered to file  
13                   a document reporting, to the best its  
14                   knowledge, the total number of  
15                   Certificates that were redeemed at  
16                   [defendants'] hotels before the  
17                   conclusion of the Certificate  
18                   Redemption.... This document shall be  
19                   filed with this Court on or before  
20                   March 15, 2004.

21                   Id., Second Amended Order of Final Judgment, ¶ 19, at 9, filed  
22                   11/12/02.

23                   (c) The Honorable Jack Komar of the Santa Clara  
24                   County Superior Court ordered such a reporting requirement in  
25                   *In re WebTV Networks Litig.*, Master File No. CV793511  
26                   (settlement fairness hearing of April 23, 2003). Judge Komar  
27                   ordered the parties to the settlement to report back on August  
28                   29, 2003, to advise the court on the number of coupons  
29                   requested by class members and the amount of cash paid out to  
30                   class members.

31                   The parties are directed to file a  
32                   report with the Court by August 29,  
33                   2003, describing the status of the  
34                   settlement distribution and claims  
35                   submitted and processed.

36                   (d) The Honorable Carl W. Holm of the San Mateo  
37                   Superior Court, while not adopting objector's specific

1 language, nonetheless ordered a reporting requirement in the  
 2 *Nuanes v. Insignia Financial Group, Inc., et al.*, No. 404228  
 3 (Super. Ct., San Mateo Cty., Cal.) class action. Judge Holm  
 4 ordered that "the person most knowledgeable about claims  
 5 administration is ordered to prepare and file a final  
 6 accounting with regard to disposition of the settlement fund."

7 (e) See also *In re California Indirect-*  
 8 *Purchaser X-Ray Film Antitrust Litig.*, No. 960886 (Super. Ct.,  
 9 San Francisco Cty., Cal.), before the Hon. A. James Robertson,  
 10 class counsel filed a multipage spread sheet, listing the  
 11 amount of the payments received by each class member from the  
 12 settlement fund.

13 5. The So-Called "Separate" Payment of Attorneys' Fees  
 14 Is Improper.

15 Class Counsel are inadequate representatives of  
 16 the class unless the two payments are merged.

17 Class Member objects to the separate payment of  
 18 attorneys' fees by Defendant to Class Counsel.

19 Palm, Inc. will separately pay the fees and  
 20 expenses that the Court awards. These amounts  
 21 will not come out of any funds for payments to  
 22 Class Members.

23 (notice, *supra*, at 9). This settlement structure is contrary  
 24 to the class's interest and should be rejected by the court  
 unless the parties agree to merge the two amounts.

25 The defendants and plaintiffs' counsel agreed on  
 26 the record that any amount by which the fees and  
 27 costs defendants agreed to pay plaintiffs'  
 counsel exceeds the sum awarded by the court  
will be paid to the plaintiffs themselves).

28 *Cisek, et al. v. National Surface Cleaning, Inc., et al.*, 954  
 F. Supp. 110 (S.D.N.Y 1997) (emphasis added).

1 (a) Class Counsel are not adequate representatives  
2 of the class as long as a conflict exists.

3 In a class action, adequate representation is a  
4 due process requirement and Class Counsel must represent the  
5 interests of absent class members at all times. (See *Phillips*  
6 *Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Matsushita*  
7 *Ele. Indus. Co., Ltd. v. Epstein*, 116 S.Ct. 874, 885 (1996)).

8 An adequate representative must...be free  
9 from economic interests that are  
10 antagonistic to the interests of the class.  
11 *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990) (emphasis  
added).

12 The class's interests are sacrificed when Class  
13 Counsel structures the settlement process so that their fee  
14 will be negotiated after the class's settlement.

15 Adequate representation requires that  
16 counsel vigorously and tenaciously protect  
17 the interests of the class. "Vigorous" and  
18 "tenacious" protection requires, at a  
19 minimum, that counsel pursue their clients'  
claims. *Epstein v. MCA, Inc.*, 126 F.3d  
1235, 1255 (9th Cir. 1997) (reversed on  
other grounds).

20 A separate fee negotiation is:

21 [N]ot merely "inadequate" representation,  
22 it was hostile representation that served  
23 the interest of counsel in getting a fee  
24 but did not serve the interests of [their  
clients]. (*Id.*).

25 A denial of adequate representation is a denial  
26 of due process. A lawyer's obligation is to benefit the  
27 client, not the lawyer. That is, if the attorney is better off  
28 with a separate fee negotiation but a better deal will result  
for the client if the settlement is structured as one fund, a

1 lawyer is obligated to make sure that the client's interests  
2 are advanced. The lawyer must subordinate his financial  
3 interests to those of his client's.

4 Plaintiffs' and Defendants' counsel are  
5 perfectly capable of understanding at the outset that the total  
6 cost to the Defendant is the sum of the attorneys' fee and the  
7 class recovery. Both sides understand the obvious fact that in  
8 giving the class less, there is more available to offer to  
9 plaintiffs' counsel. Therefore, Plaintiffs' counsel have a  
10 financial incentive not to drive the hardest bargain they can  
11 with regard to the class's recovery in the first negotiation.

12 Such a divergence of financial interest between  
13 the client and the lawyer is a paradigmatic conflict of  
14 interest. Rule 23(a)(4) simply does not permit an attorney to  
15 represent the class if he suffers from such a conflict of  
16 interest. It does not matter that Class Counsel negotiated a  
17 reasonable settlement. Rule 23(a)(4) regarding adequacy of  
18 representation is concerned with procedural safeguards.

19 Even if, arguendo, the settlement was adequate,  
20 an unconflicted attorney might have negotiated for more. It is  
21 the mere possibility that Class Counsel may negotiate to  
22 further their own interests rather than the interests of the  
23 class which makes his representation inadequate. As counsel  
24 for the class, their sole concern must be the best interests of  
25 the class. Class Counsel are not championing the cause of the  
26 class when they negotiate their fee after the class's recovery.

27 While the conflict between a class and its  
28 attorneys may be most stark where a common  
fund is created and the fee award comes out  
of, and thus directly reduces, the class

recovery [the negotiation of the attorneys' fee by the parties subsequent to the class negotiation will reduce the amount of the money which the defendants intend to make available to the class], there is also a conflict inherent in cases like this one, where fees are paid by an adversary from its own funds -- the danger being that the lawyers might urge a class settlement at a low figure or on a less-than optimal basis in exchange for red carpet treatment on fees.... It is because of the potential risk that plaintiffs' attorneys and defendants will team up to further parochial interests at the expense of the class that the Rule 23(e) protocol employed by several circuits explicitly includes scrutinizing settlements for indicia of collusion....

*In re Chambers Development Sec. Litig.*, 912 F. Supp. 852 (W.D. Pa. 1995), at 865 (emphasis added).

The plaintiffs' attorneys negotiating the settlement, on the other hand, were subject to an obvious conflict of interest with the class in making the allocation.

...

These two amounts together constituted one recovery fund from the viewpoint of the defendant who could have little interest in its allocation between the attorneys and their clients.

*Schlensky v. Dorsey*, 574 F.2d 131, 150 (1978) (emphasis added).

This situation may raise a serious ethical concern, as two circuits have cautioned, because class counsel would be placed in the position of negotiating a fee ultimately destined for his pocket at the same time that all thoughts ought to be singlemindedly focused on the client's interests.

*Obin v. District No. 9 of the Int'l Assoc. of Machinists and Aerospace Workers*, 651 F.2d 574, 582 (1981).

1 Class Counsel have abandoned the class in order  
2 to pursue a settlement structure in which they would be  
3 representing their own interests in a separate fee negotiation  
4 when they should be representing their clients at all times.

5 When counsel for the [plaintiff] class  
6 [negotiates their fees after the class's  
7 recovery], there is inherent conflict of  
8 interest. The defendant, and therefore its  
9 counsel, is uninterested in what portion of  
10 the total payment will go to the class and  
11 what percentage will go to the class  
12 attorneys; accordingly, the defense  
13 operates as no brake against the invidious  
14 effects of such a conflict of interest.

15 *Piambino v. Bailey*, 757 F.2d 1112, 1143 (1985) (emphasis  
16 added).

17 The Court must recognize that regardless of how  
18 well-intentioned Plaintiffs' counsel may claim to be, this  
19 structure benefits Class Counsel at the expense of the class.

20 Yet to some extent the wool can be pulled  
21 over the court's eyes if the parties  
22 negotiate an agreement under which legal  
23 fees will be paid separately by the  
24 defendants.

25 John C. Coffee, Jr., *The Unfaithful Champion*, *supra*, p. 7  
26 n.102 (emphasis added).

27 The following representation to the Court by  
28 defense counsel Charles Schwartz in the *Horizon Healthcare*  
29 *Corp. Litigation* sums up the impropriety of Class Counsel's  
30 conduct:

31 Your Honor, I have, from the very  
32 beginning of this litigation, ...never  
33 engaged in any discussions with the counsel  
34 regarding payment of attorneys' fees from  
35 my perspective. I think that's  
36 inappropriate for a defendant's

1 representative to negotiate over [the  
2 amount of class counsel's fee]....

3 That [the subject of attorneys' fees],  
4 respectfully, Your Honor, is a  
5 responsibility of the Court under Rule  
6 23(e), and is a matter between the class  
7 and its counsel. And, therefore, it is the  
8 appropriate position for the defendants and  
9 the defendants' counsel not to be involved  
10 in questions of agreement of amount of  
11 attorneys' fees and the like.... In fact,  
12 that's one of the reasons that some  
13 objectors object to settlements, because  
14 the defendant was involved in the question  
15 of attorneys' fees.

16 So I have not negotiated over the  
17 amount of attorneys' fees....

18 *In re Horizon/CMS Healthcare Corp. Sec. Litig.*, No. 96-0442-  
19 BB/LCS (D.N.M.), Transcript of Fairness Hearing Proceedings,  
20 9/12/97, at 103 (emphasis added).

21 A fiduciary acts solely for the interests of the  
22 person whom they have agreed to represent.

23 He who is in a fiduciary position cannot  
24 serve himself first and his *cestuis* second.

25 ....

26 It [the position as fiduciary] may not be  
27 exercised for the aggrandizement,  
28 preference or advantage of the fiduciary to  
the exclusion or detriment of this *cestuis*.

29 *Pepper v. Litton*, 308 U.S. 295, 311 (1939).

30 A person is a fiduciary who is invested  
31 with rights and powers to be exercised for  
32 the benefit of another person.

33 H.C. Black, *DICTIONARY OF LAW* (The Law Book Exchange 1991), at  
34 490, definition of "Fiduciary" (emphasis added).

35 The enforcement of an attorney's fiduciary  
36 responsibilities are of the utmost importance:



As Judge Frankfurter observed, "From a profession charged with such responsibilities, there must exacted...the strictest observance of fiduciary responsibility...."

*Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (concurring opinion) (emphasis added).

A lawyer is a fiduciary of his client and...is presumptively barred from self-dealing at the expense of the person to whom he stands in a fiduciary relationship.

(*Maksym v. Loesch*, 937 F.2d 1237, 1241 (7th Cir. 1991) (emphasis added)),

particularly in the class action context:

[A]ttorneys...seeking to represent the class assume fiduciary responsibilities to the class...."

NEWBERG ON CLASS ACTIONS (3d ed.), Ch. 15, § 1503, *Relationship Between Class Representative or Counsel and Absent Class Members* (emphasis added).

(b) The Two Payments Must Be Merged into One Common Fund.

A simple way to rectify Class Counsel's improper conduct would be to merge both payments by the defendants into one fund for the class, as suggested in the MANUAL FOR COMPLEX LITIGATION. Absent such a change, Class Counsel have violated their responsibility under Fed.R.Civ.P. 23(a)(4) -- failure to provide adequate representation to class members and breach of fiduciary duty to the class.

If an agreement is reached on the amount a settlement fund and separately providing an amount for attorneys' fees...the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class...

1 MANUAL FOR COMPLEX LITIGATION 3D, *Class Actions, Settlements, "Role*  
 2 *of the Court,"* 30.42 (Fed. Judicial Center, 1995), at 240  
 (emphasis added).

3 These two amounts together constituted one  
 4 recovery fund from the viewpoint of the  
 5 defendant who could have little interest in  
 6 its allocation between the attorneys and  
 7 their clients. The plaintiffs' attorneys  
 8 negotiating the settlement, on the other  
 hand, were subject to an obvious conflict  
 of interest with the class in making the  
 allocation.

9 *Schlensky v. Dorsey*, supra, 574 F.2d at 150 (emphasis added).

10 Any proposed settlement should be presented  
 11 in terms of the gross consideration to the  
 12 Fund or class and the matter of attorneys'  
 fees left for judicial determination and  
 award.

13 *Norman v. McKee*, 290 F. Supp. 29, 36 (1968) (emphasis added).

14 For all these reasons, class action Rules  
 15 should treat direct payments of fees from  
 16 the defendant to the plaintiffs' lawyers as  
 17 payments into the common fund. In  
 18 addition, if the defendant does not oppose  
 19 a fee below a certain amount, any fee award  
 20 "saved" by a successful challenge to the  
 award, or a *sua sponte* court reduction,  
 should go to the class and not the  
 defendant.

21 *Representing the Unrepresented*, 71 N.Y.U. L. REV. 439, at 504-05  
 22 (emphasis added).

23 All amounts to be paid by the defendants  
 24 are properly part of the settlement  
funds....

25 *In re General Motors Engine Interchange Litig.*, 594 F.2d 1106  
 26 (1979), at 1130 (emphasis added).

27 See also *Bloyed v. General Motors Corp.*, 881  
 28 S.W.2d 422, 435 (Tex. Ct. App. 1994):

Any settlement represents a total value figure that one party is willing to pay to end the controversy. Attorneys' fees, even though they may not be technically deducted from the amount paid to the litigant, represent an integral part of the overall amount that the settling party is willing to pay, and, as such, they have a direct effect on the net amount that will ultimately be paid to the litigants.

(emphasis added).

An example of the proper payment of attorneys' fees is exemplified in the *In re Domestic Air Transportation Antitrust Litig.*, in which Class Counsel established a \$50 million class cash fund for the purpose of the court's award of reasonable attorneys' fees and reimbursement of expenses consistent with their fiduciary duty to the class.

#### VI. Cash Portion of Settlements.

As part of the settlements, settling defendants have deposited a total of \$50 million into escrow accounts. ...Plaintiffs' attorneys will apply to the court for an award of reasonable attorneys' fees and for reimbursement of costs and expenses of the litigation...to be paid from the cash portion of the settlements....

*In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991).

The reasons for the class cash fund were expressed as follows:

...[I]n the negotiations which [class counsel] has described to you...for the settlement of this litigation...plaintiffs...early in the negotiations but very firmly advanced the proposition that they were not, for ethical reasons and for conflict of interest

1 reasons, subjecting...any portion of their  
2 fee to negotiation [with] defendants....

3 ....

4 We respected the ground on which they  
5 made that statement, the ethical  
6 concerns that supported it, and, so,  
7 from the defendants' standpoint -- the  
8 plaintiffs' entitlement to fees -- we  
9 have taken the position is not our  
10 business and should not be....

11 *In re Domestic Air Trans. Antitrust Litig.*, No. 1:90-CV-  
12 2485-MHS (N.D. Ga.) (Trans. Proc. before Senior Judge  
13 Marvin H. Shoob, Nov. 30, 1992, at 31-32 (emphasis added).  
14

15 6. An additional reason for the appointment of a  
16 special master is the language in the notice which reads:

17 (a) If you want to be represented by your own  
18 attorney, you may hire one at your own  
19 expense.  
20

21 Class Member objects to this language in the notice. It  
22 unnecessarily discourages class members from fully  
23 participating in the fairness hearing. Objector could be  
24 entitled to have their counsel's fee and expenses reimbursed by  
25 court order. The language in the notice is incorrect,  
26 misleading, and contrary to the interests of class members and  
27 the effective functioning of the class action mechanism.  
28 This statement constitutes misinformation in that the Court has  
the power and authority to award reasonable attorneys' fees to  
counsel for any class member objector.

(b) The objection and any supporting papers must be  
mailed to and actually received by each of the  
following no later than April 7, 2008:  
(notice at 9).

1           Class Member objects to the above-referenced notice  
2 provision that requires actual receipt of copies of the  
3 objection on the date the objection is to be filed with the  
4 court. This direction is confusing and unnecessarily  
5 burdensome. Objectors should only be required to provide proof  
6 of service of mailing by a certain date. There is no reason  
7 why class members should be held to a more onerous standard  
8 than attorneys regarding proof of service for a pleading filed  
9 with a Court.

10           7. Class Member objects to any settlement provision that  
11 requires class members to monitor the settlement Web site in  
12 order to obtain settlement benefits.

13                   Check the website ([www.palzasettlement.com](http://www.palzasettlement.com)) to learn  
14 when the Effective Date has occurred to determine  
15 when your right to repair will expire.

16 (notice at 6).

17           8. Class Member objects to the request that he  
18 provide his current address and telephone number in a  
19 public pleading. Such a request is inconsistent with the  
20 privacy protections that should be accorded class members.  
21 His address and telephone number are known to the Defendant  
22 or, if necessary, can be obtained from his counsel.

23           Dated: April 4, 2008

24  
25                   Respectfully submitted,

26                   *Lawrence W. Schonbrun*

27                   Lawrence W. Schonbrun  
28                   Attorney for Plaintiff Class  
                  Member/Objector David Brennan

**PROOF OF SERVICE**

I declare that:

I am employed in the County of Alameda, California. I am over the age of 18 years and not party to the within action; my residence address is 44 Emery Bay Drive, Emeryville, California 94608.

On April 4, 2008, I served the attached:

OBJECTION AND NOTICE OF INTENTION TO APPEAR AT HEARING  
ON PROPOSED SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND  
EXPENSES

  X  

By Federal Express to the person set forth below by placing the original and a true copy thereof in a sealed Federal Express envelope in a designated area for express mail pickup, addressed as follows:

Office of the Clerk  
U.S. States District Court for the Northern District of  
California, San Jose Division  
280 South First Street, Room 2112  
San Jose, CA 95113

  X  

By mail on the below-named parties in said action by placing a true and accurate copy thereof in a sealed envelope, with postage thereon fully prepaid, and depositing the same in the United States Mail in Alameda County, California, to the addresses set forth below:

Ralph M. Stone, Esq.  
Shalov Stone Bonner and Rocco  
485 Seventh Avenue, Ste. 1000  
New York, NY 10018

Penelope A. Preovolos, Esq.  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, CA 94105

///


///

///

1 Clerk, Dept. 8  
2 Hon. Ronald M. White  
3 Judge, U.S. District Court for the Northern District of  
4 California, San Jose Division  
5 280 South First Street  
6 San Jose, CA 95113  
7 (courtesy copy)

8 I declare under penalty of perjury under the laws of the  
9 State of California that the foregoing is true and correct.

10 Executed on April 4, 2008.

11   
12 \_\_\_\_\_  
13 Sandra Norris



ADDENDUM A

a) Numerous courts, both state and federal, academic commentators, and the United States Congress have endorsed the approach of calculating the final award of attorneys' fees after the number of class members who actually utilize settlement benefits is known and considered.

By conditioning the award of attorney's fees upon the claims actually submitted, the Court of Chancery exercised its discretion equitably, to correlate the attorneys' compensation with the structure of the settlement benefits the attorney had negotiated for the class.

*Goodrich v. E.F. Hutton Group, Inc.* (Del. Supr.), 681 A.2d 1039 (1996), at 1049) (emphasis added).

Staging the fee award in this manner will ... help ensure that the fee award is proportionate to the actual value created for the class ... [and] will emphasize the principle that in class actions the interests of counsel who negotiate settlements should align with the interests of the class.

*Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997) (emphasis added).

[O]ne should nevertheless ask whether a rule of law that would hold that there is an entitlement, on the part of class counsel, to a legal fee fixed in relation to a maximum available fund rather than benefits actually realized by class members, would be a desirable general rule.... In my opinion, the answer is certainly no.

*Wise v. Popoff*, 835 F. Supp. 977, 981 (E.D. Mich. 1993) (emphasis added).

[The language in the PSLRA] is intended to prevent the payment of attorney's fees based on an inflated settlement figure, where a large part of the settlement is later returned to the coffers of the settling defendant because of a low number of claims. Before awarding fees, therefore, the Court must determine what portion

1 of the settlement fund will actually be paid to  
2 plaintiffs.

3 *Lyons v. Scitex Corp.*, 987 F. Supp. 271, 279 (S.D.N.Y. 1997)  
4 (emphasis added).

5 I am not confident of the redemption rate that  
6 has been projected and thus of the settlement's  
7 total value. Therefore I have determined to  
8 delay [the] award of attorney fees until  
9 experience shows how many vouchers are exercised  
10 and thus how valuable the settlement really is.

11 *In re Compact Disc Minimum Advertised Price Antitrust Litig.*,  
12 292 F.Supp.2d 184, 190 (D. Me. 2003) (emphasis added).

13 This Court is concerned, however, about the  
14 possibility that the actual value of the  
15 settlement may fall significantly short of the  
16 estimated value, thus drastically altering the  
17 proportionality of the fee award to the benefit  
18 actually conferred to class members.

19 *Bussie v. Allmerica Financial Corp., et al.*, No. 97-40204-NMG  
20 (D. Mass. May 19, 1999), 1999 U.S. Dist. LEXIS 7793, \*7  
21 (emphasis added).

22 [T]o approve the fee requested provisionally,  
23 permit its partial payment immediately, but  
24 reserve the balance for payment either in full or  
25 after any appropriate adjustment in the light of  
26 actual experience under the settlement.  
27 (emphasis added).

28 *Id.* at \*9, citing *Hancock Fee Decision*, 989 F. Supp. at 379.

"The court is of the view that of substantial  
significance is the value of the benefit actually  
received by those on whose behalf the action was  
allegedly instituted.

....

"The key element in assessing the reasonableness  
of an attorney's fee and any adjustment made in  
the amount requested is 'the relationship between  
the amount of the fee awarded and the results  
obtained.'"

*Clement v. American Honda Finance Corp.*, 176 F.R.D. 15, 31 (D.  
Conn. 1997) (citations omitted; emphasis added).

1  
2 Thus at this point the extent of the benefit to  
3 the class cannot be determined with any degree of  
4 exactitude. It may be that so few will  
5 receive payment (with the unused portion of the  
6 settlement fund going back to Greyhound) that the  
7 benefits to the class will be "miniscule"....

8  
9 ....  
10 Under the circumstances, the fee determination  
11 will be reserved until all claims of shareholders  
12 entitled to participate in the settlement have  
13 been filed and determined.

14  
15 *Voegel v. Ackerman*, 67 F.R.D. 432 (S.D.N.Y. 1975), at 436  
16 (footnotes omitted) and 437. See also *Bowling v. Pfizer, Inc.*,  
17 922 F. Supp. 1261, 1283-84 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th  
18 Cir. 1996) (holding back large portion of fee award until  
19 additional "future" benefits to class were actually paid into  
20 class fund).

21  
22 In *Waters v. Int'l Precious Metals Corp.*, 190 F.3d  
23 1291, 1294 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000),  
24 United States Supreme Court Justice Sandra Day O'Connor had the  
25 following remarks about the importance of actual utilization of  
26 class member benefits in setting reasonable attorneys' fees.

27  
28 In *Boeing v. Van Gemert*, 444 U.S. 472 (1980)....  
We had no occasion . . . however, to address  
whether there must be at least some rational  
connection between the fee award and the amount  
of the actual distribution to the class. The  
approval of attorney's fees absent any such  
inquiry could have several troubling  
consequences. Arrangements such as that at issue  
here decouple class counsel's financial  
incentives from those of the class, increasing  
the risk that the actual distribution will be  
misallocated between attorney's fees and the  
plaintiffs' recovery. They potentially undermine  
the underlying purposes of class actions by  
providing defendants with a powerful means to  
enticing class counsel to settle lawsuits in a  
manner detrimental to the class.... Although I

believe this issue warrants the Court's attention, this particular case does not present a suitable opportunity for its resolution.

*Id.*, 530 U.S. at 1224-25 (emphasis added).

b) Numerous academic commentators on the class action mechanism support the use of evidence of actual utilization of class member benefits as a factor in setting reasonable attorneys' fees in class actions.

Professor Janet Cooper Alexander recommends:

*Tie the lawyers' compensation directly to the interests of the class.*

The application, briefing and hearing on the fee request should not take place until after all claims are filed, and the judge should be required to take into account the actual benefit conferred on the class (as demonstrated by the claims made)....

Janet Cooper Alexander, *Contingent Fees in Class Actions*, 47 DEPAUL L. REV. 347, 360 (emphasis added).

Professor Judith Resnick notes:

The innovation of the securities fee statute is to limit judicial discretion by requiring that fees are a percentage of monies actually received by class members, as contrasted to a percentage of a fund established.

Judith Resnick, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 UNIV. PA. L. REV. 2119, 2122-23 n.6 (2000) (underline added; italics in original).

The RAND Institute for Civil Justice notes:

To avoid rewarding class action attorneys for dubious accomplishments, judges should award fees [based upon the benefits] *actually disbursed* to class members or other beneficiaries of the litigation."

....

An added benefit of linking class action

attorneys' fees to disbursements is that it would give the attorneys an interest in ensuring expeditious and effective delivery of compensation to class members.

RAND Institute for Civil Justice, "Achieving the Objectives of Rule 23(b)(3) Class Actions," at 491.

Professor John C. Coffee, Jr., in his article *Claims Made Settlement: An Ethical Critique*, NEW YORK LAW JOURNAL (July 15, 1993), "Corporate Securities," notes:

[L]awyers are fiduciaries to the class they serve, and when the fiduciary is economically indifferent to the class's success, a "moral hazard" problem arises.

....  
Escrow procedures could be utilized to ensure that the attorney's return would rise and fall with the class members' recovery in order to keep their interests reasonably aligned.

*Id.* at 5 (emphasis added).

Professors Geoffrey P. Miller and Lori Singer note, in their article *Nonpecuniary Class Settlements*, 60 LAW AND CONTEMP. PROBS. 97, Duke Univ. Sch. of Law (Nos. 3 & 4, Summer & Autumn 1997):

As a final complication, the plaintiffs' attorneys may use the valuation potential of the settlement to shop for high fees among the different jurisdictions that can hear the case.... Again, this fee will come at expense of the class's optimal recovery because the attorneys' fee should be predicated on the actual value of the fund the class receives.

*Id.* at 112 (footnotes omitted).

The importance of proper incentives to class counsel was noted in the Law Review article *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997):

The attorneys' [fee] recovery should be tied to [the recovery] of the class; to the extent the attorneys hope to prosper in the representation, that reward should be a direct product of what they return to the class.

....

[I]t impedes sweetheart deals by ensuring that attorneys' [fee] recoveries are directly tied to the actual return to the class....

*Id.* at 829 and 830 (emphasis added).

See Fed.R.Civ.P. 23(h) advisory committee's note; *Strong v. Bellsouth Telecomms., Inc.*, 137 F.3d 844, 853 (5th Cir. 1998) (holding the trial court did not abuse its discretion in considering the actual results of the settlement). The federal Class Action Fairness Act of 2005 addresses this issue directly by tying the attorney fee award to "redeemed" coupons. Pub.L.No. 109-002, 119 Stat. 4 (2005).

Michael Northrup, *Restrictions on Class Action Attorney Fee Awards*, 46 S. Tex. L. Rev. 953 (Summer 1005), at n.83.

c) The noted federal jurist, the Honorable John F. Grady, in his article *Reasonable Fees: A Suggested Value-Based Analysis for Judges*, 184 F.R.D. 131 (1999), states:

Is the recovery something the client is going to use? A benefit obtained for a client that is unused by the client does not justify a substantial fee.

d) Congress has demonstrated an a commitment to this principle in the wording of Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §§ 77z-1(a)-(3)(B)(v)).

Total attorneys' fees and expenses awarded by the court to attorneys for the plaintiff class [shall be based upon] the amount of any damages and prejudgment interest actually paid to the class.

*Id.* at § 77z-1(a)(6) (emphasis added).

1 See also the proposed Amendment of Senator Patrick  
2 Leahy to the Class Action Fairness Act of 2003.

3 Leahy's bill would deal with noncash  
4 settlements - the coupon problem - by tying the  
5 part of the fee paid to class counsel to the  
6 value of the coupon settlements actually  
7 redeemed.... Leahy's bill is backed by consumer  
8 groups because it addresses [a] major problem in  
9 class actions: worthless coupon settlements ...  
10 said Jackson Williams, legislative counsel to  
11 Public Citizen's Congress Watch.

12 "If the coupon is worthless and no one uses  
13 it, the attorney gets no compensation," he said.  
14 "It will force attorneys to fight the meritorious  
15 cases harder, which is good for consumers and  
16 good for business. Honestly, there are some  
17 class actions for trivial harms and they're only  
18 brought because of the possibility of a worthless  
19 coupon settlement."

20 Marcia Coyle, *Senate Eyes Competing Class Action Bills*, THE  
21 NATIONAL LAW JOURNAL (May 5, 2003).



Lawrence W. Schonbrun, Esq. (CSB No. 054519)  
Law Offices of Lawrence W. Schonbrun  
86 Eucalyptus Road  
Berkeley, CA 94705  
Tel: (510) 547-8070

Attorney for Plaintiff Class  
Member David Brennan

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

In re:	) <u>Class Action</u>
	)
PALM TREO 600 and 650	) Case No.: C-05-03774 RMW
LITIGATION	)
	) DECLARATION OF CLASS MEMBERSHIP
	) <u>OF DAVID BRENNAN</u>
	)
	)

My name is David Brennan.

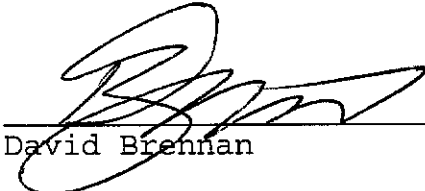
1. I am a United States resident who purchased in the United States a new ~~Treo 600~~ [Treo 650] smartphone. I purchased this Treo smartphone for my own use and not for resale on April 14, 2008 (02)

2. As a result of this purchase (see attached), I understand I am a member of a class defined as "all United States residents who purchased in the United States a new Treo 600 or Treo 650 smartphone for their own use and not for resale."

3. I have retained Lawrence W. Schonbrun as additional counsel to represent my interests in the further proceedings in this action.

1           4. I authorize Mr. Schonbrun to take all steps which he  
2 deems necessary to protect and promote my interests in this  
3 litigation, including but not limited to filing an objection on  
4 my behalf.

5           I declare under penalty of perjury that the foregoing is  
6 true and correct. Executed at Dublin, California, on this 31<sup>st</sup>  
7 day of March, 2008.

8  
9  3/31/08  
10 David Brennan  
11 Serial No. PTPC 03N6H 1DE  
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CCS8632 AUTH ID: CCS8632, STORE: 1111, OVERRIDE REASON: PRICE MATCH EQUIPMENT,  
OVERRIDE FOR SKU: POTR650HK, ORIGINAL PRICE: \$499.99, NEW PRICE: \$199.99,  
DESCRIPTION: PER DENIS M

04/14/2006 - 12:00:00

BAN

CCS8632 Last Bill Date 20060406, Previous Balance \$ 71.42, Total Balance Due \$ 137.89 Charges  
for: 20060407 - 20060506: Recurring: \$ 65.00, Other: \$ -4.33, Usage: \$ 1.40, Payments: \$ 0.00,  
Adjustments \$ 0.00, Discounts \$ 0.00, Total Estimated Amount: \$ 133.49 Estimated account Balance:  
\$ 133.49

04/14/2006 - 12:00:00

BAN

CCS8632 Last Bill Date 20060406, Previous Balance \$ 71.42, Total Balance Due \$ 137.89 Charges  
for: 20060407 - 20060506: Recurring: \$ 65.00, Other: \$ -4.33, Usage: \$ 1.40, Payments: \$ 0.00,  
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04/14/2006 - 12:00:00

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DESCRIPTION: PER DENIS M

04/14/2006 - 12:00:00

BAN

CCS8632 AUTH ID: CCS8632, STORE: 1111, OVERRIDE REASON: PRICE MATCH EQUIPMENT,  
OVERRIDE FOR SKU: POTR650HK, ORIGINAL PRICE: \$499.99, NEW PRICE: \$199.99,  
DESCRIPTION: PER DENIS M

04/14/2006 - 12:00:00

BAN

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OVERRIDE FOR SKU: POTR650HK, ORIGINAL PRICE: \$499.99, NEW PRICE: \$199.99,  
DESCRIPTION: PER DENIS M